

US EPA ARCHIVE DOCUMENT

**MEMORANDUM OF AGREEMENT
BETWEEN
THE STATE OF WEST VIRGINIA
AND
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION III**

I. GENERAL

This Memorandum of Agreement (hereinafter "MOA") establishes responsibilities and procedures pursuant to 40 C.F.R. § 271.8 for the State of West Virginia (hereinafter "State") Hazardous Waste Program, authorized by § 3006 of the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6901, et seq. (hereinafter "RCRA" or "the Act") (hereinafter "State Program" or "Program") and the United States Environmental Protection Agency, Region III (hereinafter "EPA").

This MOA further sets forth the manner in which the State and EPA will coordinate in the State's administration and enforcement of the State Program and, pending additional authorization, EPA's administration of the non-authorized provisions of the Hazardous and Solid Waste Amendments of 1984 (hereinafter "HSWA") and EPA's regulations thereunder. For purposes of this MOA, references to "RCRA" include HSWA.

This MOA is entered into by the Secretary of the Department of Environmental Protection (hereinafter "Secretary") and the Regional Administrator of EPA Region III (hereinafter "Regional Administrator"). The attached "Memorandum of Understanding between West Virginia Department of Environmental Protection and West Virginia Public Service Commission and West Virginia Department of Transportation, Division of Highways" evidences the agreement of the Department of Environmental Protection, the Public Service Commission (hereinafter "PSC") and the Department of Transportation, Division of Highways (hereinafter "DOH") to set out the roles and responsibilities of the State agencies necessary to coordinate and perform the duties outlined in the West Virginia Hazardous Waste Management Act and RCRA. *Please see*, "Memorandum of Understanding" attached hereto as Appendix A and incorporated herein as if fully restated. For administrative purposes, the Department of Environmental Protection (hereinafter "DEP") will serve as lead agency to simplify coordination and communication between the State and EPA.

Nothing in this MOA will be construed to restrict in any way EPA's authority to fulfill its oversight and enforcement responsibilities and authorities under Subtitle C of RCRA. Nothing in this MOA will be construed to contravene any provision of 40 C.F.R. part 271 or any other federal law or regulation.

Nothing in this MOA shall be construed as EPA's authorization of the State's Voluntary Remediation Program as set forth in the State's Voluntary Remediation and Redevelopment Act (W. Va. Code § 22-22-1, et seq.) and the rule promulgated thereunder (*Voluntary Remediation and Redevelopment Rule*, 60 C.S.R. 3) (hereinafter "the VRP") for RCRA corrective action authorization purposes. Moreover, nothing in this MOA relieves any person performing a

cleanup in accordance with the VRP from meeting the RCRA corrective action responsibilities or requirements of the EPA-authorized State Corrective Action Program.

The State and EPA (hereinafter “Parties” or “Party” as appropriate) will review this MOA jointly at least once per calendar year.

This MOA supersedes the MOA that became effective on December 15, 2003. This MOA may be modified upon the initiative of either Party to ensure consistency with State Program modifications or for any other purpose mutually agreed upon. Any revisions or modifications to this MOA will be in writing and must be signed by the Secretary and the Regional Administrator. Any revisions or modifications to the Memorandum of Understanding will be in writing and must be signed by the Secretary, the Chairman of the PSC, and the Secretary of the Department of Transportation and must be transmitted immediately to the Regional Administrator for approval. This MOA will remain in effect until such time as EPA withdraws State Program authorization or the State voluntarily transfers authority to EPA according to the criteria and procedures established in 40 C.F.R. §§ 271.22 and 271.23,

II. POLICY STATEMENT

As reflected by the Memo of Understanding, each of the Parties thereto and to this MOA is responsible for ensuring that its obligations under Subtitle C of RCRA are met. Upon granting of final authorization by EPA, the State will assume primary responsibility for implementing the authorized provisions of the State Hazardous Waste Program within its boundaries. The State will conduct its Hazardous Waste Program in a manner consistent with EPA program policies and guidance.¹ EPA will retain its responsibility to ensure full and faithful execution of the requirements of RCRA, including direct implementation of HSWA in the event the State is not authorized to act thereunder. The Secretary and the Regional Administrator agree to maintain a high level of cooperation between their respective staffs in a partnership to assure successful and effective administration of the State Program. While EPA retains responsibility for the direct implementation of those provisions of HSWA for which the State is not authorized, EPA and the State intend to coordinate the implementation of these provisions to the greatest degree possible.

Section 3006(g) of RCRA provides that hazardous waste requirements and prohibitions promulgated pursuant to HSWA are applicable in authorized states at the same time that they are applicable in unauthorized states, with the exception of § 3006(f), “Availability of Information”, which cannot be implemented by EPA in authorized states. If such HSWA requirements are less stringent than the State’s authorized Program, the State’s rules would govern.

¹ These policies and guidance include, at a minimum, the OSWER Consolidated Guidance; the Office of Enforcement and Compliance Assurance MOA guidance; RCRA Civil Penalty Policy dated June 2003; National Criteria for a Quality Hazardous Waste Program; EPA’s Hazardous Waste Civil Enforcement Response Policy dated December 2003, and any revisions thereto; the EPA Policy on Performance Based Assistance dated May 31, 1985; the May 1, 1996 Advanced Notice of Proposed Rulemaking for the Corrective Action Program; Setting Customer Service Standards (E.O. 12862, September 11, 1993); Improving Customer Service (Fred Hanson, April 8, 1998); Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (E.O. 12892, February 11, 1994); and EPA OSWER Environmental Justice Action Agenda (EPA 540/R-95/023, 1995).

EPA will execute its required oversight functions of the authorized State Program to ensure full execution of the requirements of RCRA, to promote national consistency in the implementation of the Hazardous Waste Program, to allow EPA to report to the President and Congress on the achievements of the Hazardous Waste Program, and to encourage states and EPA to agree on the desirable technical support and joint efforts to prevent and to mitigate environmental problems associated with the improper management of hazardous wastes. EPA will conduct oversight functions through written reporting requirements, permit overview, compliance and enforcement overview, and mid-year and annual reviews of the State's Program.

III. STATE PROGRAM REVIEW

A. General

The Regional Administrator will assess the State's administration and enforcement of the Hazardous Waste Program on a continuing basis for equivalence and consistency with RCRA, with this MOA, and with all applicable federal requirements and policies for the adequacy of enforcement. EPA will assess the State's administration and enforcement by reviewing information the State submits in accordance with this MOA, the State's RCRA § 3011 grant work plan (hereinafter "Grant Work Plan"), and through periodic reviews of the State's Program activities. EPA may also employ other mechanisms to aid in its assessment of the State's Program.

To ensure effective Program review, the State agrees to allow EPA access to all files and other information the Regional Administrator or his or her designee requests, which EPA deems necessary for reviewing and evaluating State Program administration and enforcement. Review of the State's files may be scheduled periodically; however, the State agrees to allow EPA access to specific files more frequently as circumstances warrant (e.g. for enforcement actions). Program review meetings between the Secretary and the Regional Administrator or their designees will be scheduled at reasonable intervals not less than annually to review specific operating procedures and schedules, to resolve problems, and to discuss mutual Program concerns. These meetings will be scheduled at least fifteen (15) days in advance, unless EPA and the State agree to a different length of time. A tentative agenda for the meeting will be prepared in advance by EPA.

The Regional Administrator may also consider, as part of his or her regular assessment, written comments about the State's Program administration and enforcement that are received from regulated persons, the public, and federal, State or local agencies.

B. Identification and Priority Activities

The State and EPA agree to develop, as a part of the State's Grant Work Plan, criteria for priority activities, including activities regarding handlers of hazardous waste. These criteria will be based on EPA program guidance, the Office of Enforcement and Compliance Assurance (OECA) model MOA, and priorities of the State, and will be used to identify activities that should receive the highest priority during the grant period. They will be reviewed annually and revised as appropriate. Activities that could be considered high priority include, but are not

limited to, facilities to be inspected or permitted, facilities that require corrective action, and enforcement against owners or operators of facilities with known or suspected contamination that pose a risk to human health or the environment.

IV. INFORMATION SHARING

A. General

This Section covers information sharing on miscellaneous elements of the RCRA program, including notification, Resource Conservation and Recovery Information (hereinafter "RCRAInfo") data, etc. Specific information sharing requirements for the other major program elements are covered in Sections V (Permit Issuance), VI (Permit Administration), VII (Corrective Action), VIII (Waivers, and Delisting), and IX (Compliance Monitoring and Enforcement). As the respective information needs of the State and EPA evolve, changes to this section of the MOA may be appropriate. During the annual review of this MOA, the Secretary and the Regional Administrator will carefully examine the following information sharing provisions and revise them as appropriate.

EPA and State responsibilities regarding the maintenance and operation of the RCRAInfo system are specified in the EPA-State Cooperative Grant Agreement negotiated between EPA Region III and the State and in the Grant Work Plan. Examples of responsibilities addressed in the grant agreement include, but are not limited to, the following:

- Processing hazardous waste notification forms;
- Issuing EPA identification numbers;
- Submitting and using compliance and enforcement information;
- Submitting and using corrective action information;
- Processing hazardous waste permitting information; and
- Submitting information to correct inaccurate information.

B. EPA

Consistent with applicable law and regulations, EPA will:

- Keep the State informed in a timely manner of the content and meaning of federal statutes, regulations, guidelines, standards, policy decisions, directives, and other factors that affect the State's Program. EPA will also provide timely technical guidance to the State. EPA will share with the State any national reports EPA develops from the data submitted through State reporting requirements.
- Make available to the State, as requested, other relevant information that the State needs to implement its approved Program, subject to the conditions of 40 C.F.R. part 2.
- Bring to the State's attention any new comments it receives regarding the State's administration of the Hazardous Waste Program.
- Make available to the State, as requested, any necessary training relating to RCRA Subtitle C, as resources and circumstances allow.

- Provide technical assistance to the State, as requested, in its review of permit applications, draft permits, permit modifications, closure/post-closure plans, variances, waivers, etc., as resources allow.

If EPA promulgates new standards requiring permit modification, EPA may, pursuant to 40 C.F.R. § 270.42(b)(6)(vii), extend the time period for final approval or denial of a modification request until such time as the State receives authorization for the new standards.

C. State

The State agrees to inform the Regional Administrator in advance of any proposed Program changes that would affect the State's implementation of the authorized Program. Program changes of concern include modifications of the State's legal authorities (i.e. statutes, administrative rules, and judicial or legislative actions affecting those authorities), modifications of Memoranda of Agreement or Understanding with other agencies, and modifications of resource levels that would have a negative impact on the State's ability to carry out the terms of this MOA (e.g. available or budgeted personnel and funds). The State recognizes that Program revisions must be made in accordance with the provisions of 40 C.F.R. § 271.21 and that, until approved by EPA, revisions are not authorized as RCRA Subtitle C requirements.

EPA and the State will agree on the type and frequency of reports that the State will prepare for EPA to maintain oversight of the implementation of the State's authorized Program. A specific list of reports and their frequency will be included in the Grant Work Plan and will constitute a grant commitment for the State. Reporting will include, but not be limited to, the following:

- Strategic planning goals and accomplishments;
- Information required pursuant to 40 C.F.R. § 270.5;
- The quantities and types of hazardous waste generated, transported, treated, stored, and disposed of in the State, which report shall be submitted by October 1 of each even-numbered year;
- Copies of all inspection reports, record reviews, and sampling results for all commercial facilities, treatment, storage, and disposal facilities (TSDFs), large quantity generators (LQG), federal facilities, and non-notifiers. For small quantity generators (SQG), the above-reports need only be submitted where there are detected violations;
- Copies of all enforcement actions, orders, and judgments regarding commercial facilities, non-notifiers, TSDFs, federal facilities, and generators; and
- Statistical summaries and charts of each quarter's accomplishments for compliance and enforcement, listed by category and EPA ID number.

EPA reserves the right to request any information it deems necessary relating to the State's approved Program in a manner to be specified in the Grant Work Plan.

The State agrees to provide permit and closure information to EPA as specified in the Grant Work Plan. A listing of the information that the State will submit to EPA and a submittal

schedule will be included in the Grant Work Plan and will constitute a grant commitment for the State. The required information shall include, but is not limited to, the following:

- Copies of permit applications submitted to the State and subsequent revisions or additions to those applications on or after the effective date of this MOA for all hazardous waste management facilities in the State, unless such applications have been sent to EPA by the facility;
- Copies of draft permits, proposed permit modifications, draft permit denials, and accompanying explanatory material for all hazardous waste management facilities in the State. EPA may also request copies of completeness and technical reviews for selected permits being worked on during the fiscal year;
- Copies of all final permits issued, modified, reissued or terminated and notices of permit denials; and
- The following closure/post-closure data:
 - Copies of the public notices announcing the receipt of closure/post-closure plans and public hearings, if applicable;
 - Copies of the approved closure and post-closure plans for all facilities;
 - Copies of the closure certifications for facilities signed by an independent registered professional engineer (or an independent qualified soil scientist, in cases of land treatment facilities) and the owner or operator;
 - Copies of the State's reports of inspections conducted during closure and after receipt of closure certification; and
 - Copies of any notice placed in the property deed or other instrument that is normally examined during a title search, annotating the existence of any closed disposal facility/unit or cell.

The State may request technical assistance in the review of permit applications, draft permits, permit modifications, closure/post-closure plans, etc. EPA will honor these requests as resources allow. The priorities for permitting will be reviewed annually.

Upon EPA's request, the State agrees to provide EPA with copies of reports or data resulting from any compliance inspection and subsequent enforcement actions.

The State agrees to provide any pertinent information requested by the Regional Administrator or his or her designee within a mutually agreed upon time frame in order for EPA to carry out its oversight responsibilities. Unless otherwise specified, the above information will be sent to:

U.S. Environmental Protection Agency, Region III
West Virginia State Program Manager, 3LC50
1650 Arch Street
Philadelphia, PA 19103-2029

In accordance with the provisions of 40 C.F.R. §§ 271.14 and 124.10(c), the State agrees to develop and maintain a public mailing list and have it readily available for EPA before public notice of an action by the State regarding a facility. An acceptable list may be specific to certain

facilities, areas, or concerns or the list may be a general State-wide list used in all cases. This list should be kept current and accurate.

D. Obtaining and Sharing Information for National Data

EPA is responsible for maintaining reliable national data on hazardous waste management. These data are used to report to the President and Congress on the achievements of the Hazardous Waste Program and to support EPA's regulatory development efforts. Whenever EPA determines that it needs to obtain such data, EPA will first seek to gain it from the State, which agrees to supply this information to the Regional Administrator if readily available and as resources allow. If the State is unable to provide the information, or if it is necessary to supplement the State information, EPA may conduct a special survey or perform information collection site visits after notifying the State. EPA will share with the State any national reports developed by EPA as a result of such information collection.

E. Emergency Situations

Upon receipt of any information that the handling, storage, treatment, transportation or disposal of hazardous waste is endangering human health or the environment, the Party in receipt of the information will immediately notify, by telephone, the other Parties to this MOA and to the attached Memorandum of Understanding of the existence of the situation. The relevant telephone numbers are listed immediately below:

- For DEP, the 24-hour response number is: (800) 642-3074.
- For DOH, the 24-hour response number is: (304) 558-3028.
- For PSC, the 24-hour response number is: (304) 340-0474.
- For EPA, the 24-hour response number is: (215) 814-9016.

F. Confidentiality

Any information obtained or used in the administration of the State's Program will be made available to the EPA upon request without restriction, including any information associated with the administration of the State's Voluntary Remediation and Redevelopment Act (VRRRA). If the information has been submitted to the State under a claim of business confidentiality or trade secrets, the State must submit that claim to EPA when providing the information. Any information obtained from the State subject to a claim of business confidentiality or trade secrets will be treated in accordance with the requirements of 40 C.F.R. part 2. If EPA obtains from the State information that is not subject to a claim of business confidentiality or trade secrets, EPA may make that information available to the public without further notice, subject to the requirements of 40 C.F.R. part 2.

EPA agrees to furnish to the State information in its files that is not submitted under a claim of business confidentiality or trade secrets and that the State needs in order to implement its Program. Subject to the conditions of 40 C.F.R. part 2, EPA will furnish to the State information submitted to EPA under a claim of business confidentiality or trade secrets that the State needs to implement its Program. All information EPA agrees to transfer to the State will be

transferred in accordance with the requirements of 40 C.F.R. part 2. EPA will notify affected facilities when such information is sent to the State.

V. PERMIT ISSUANCE

A. EPA Permitting

Upon authorization of the State Program, EPA suspended issuance of federal permits for hazardous waste treatment, storage, and disposal facilities for which the State has received authorization. If EPA promulgates standards for additional regulations mandated by HSWA that are not covered by the State's authorized Program, EPA will issue and enforce RCRA permits in the State for these new regulations until the State receives final authorization for equivalent State standards.

As the State receives authorization for additional provisions of HSWA, EPA will suspend issuance of federal permits in the State for those provisions. EPA will transfer any pending permit applications, completed permits, or pertinent file information to the State within thirty (30) days of approval of the State Program or other mutually agreed upon schedule, in conformance with the conditions of this MOA.

B. State Permitting

The State is responsible for expeditiously drafting, circulating for public review and comment, issuing, modifying, reissuing, and terminating RCRA permits for those hazardous waste treatment, storage, and disposal facilities subject to the authorized provisions of the State's Program. The State will do so in a manner consistent with RCRA, as amended by HSWA, this MOA, all applicable federal requirements, the State's Program Description and Program Description Addendum, the Gant Work Plan, and other State requirements. The State's permitting process will conform to 33 C.S.R. 20 § 11, which is analogous to 40 C.F.R. parts 270 and 124.

The State agrees to issue, modify or reissue all permits contained in the authorized portions of the State's Program in accordance with 33 C.S.R. 20 § 11, which is analogous to 40 C.F.R. parts 270 and 124, and to include as permit conditions all applicable provisions of 33 C.S.R. 20 § 7, which is analogous to 40 C.F.R. part 264. This MOA also applies to permits issued after final authorization, but for which the processing may have begun before final authorization.

In permits issued pursuant to the State's authorized Program, DEP will ensure that compliance tasks are described in clear, unambiguous, and plain language to the extent practicable. The compliance tasks should be clear, measurable, and definable, thereby lending themselves to greater enforceability. For example: "Conduct periodic inspections" should be replaced with "Inspect on a daily/weekly/biweekly/monthly basis. A log book documenting inspections will be maintained at the facility for a period of three years."

The State agrees that any compliance schedule contained in permits it issues will require compliance with applicable standards as soon as possible. The State further agrees to consider all comments that EPA makes on permit applications, proposed permit modifications, and draft permits before issuing the permit or making the modification. The State will satisfy or refute in writing any EPA written comments on a particular permit application, proposed permit modification, or draft permit before issuing the permit or making the modification. In addition, the State agrees not to issue a permit or approve a modification in dispute until the Regional Administrator and the Secretary have exercised the dispute process outlined in Section V.C. below.

The State agrees to submit to EPA no less than forty-five (45) days prior to public notice those draft permits or proposed permit modifications identified for oversight in the Grant Work Plan. The State also agrees to submit copies of all final permits to EPA within ten (10) days of issuance.

C. EPA Review of State Permits

In accordance with 40 C.F.R. § 271.19, EPA may comment on any draft permit or proposed permit modification, whether or not EPA commented on the permit application. EPA may review file information at State offices or request a copy of any permit application, draft permit or proposed permit modification, statement of basis or fact sheet, and any supporting documentation that was considered in the development of any draft permit. The State will provide this information to EPA within seven (7) days of EPA's request or within a mutually agreed-upon time frame. While EPA may comment on any permit application, draft permit or proposed permit modification, EPA will focus primarily on those facilities identified by the State or EPA in the Grant Work Plan or types of facilities identified as a priority in EPA national guidance.

EPA will notify the State of its intent to comment on a State draft permit or proposed permit modification within thirty (30) days of receipt. EPA will comment within forty-five (45) days of receipt or will request an extension to submit those comments as warranted. Where EPA indicates in a comment that issuance, modification, reissuance, termination, or denial of the permit would be inconsistent with the approved State Program, EPA will include in the comment:

1. A statement of the reasons for the comment, including the section of State law or administrative rules that support the comment; and
2. The actions that the State should take to address the comments, including the conditions that the permit would include if it were issued by EPA.

Generally, EPA and the State will attempt to resolve all EPA comments on an informal basis before a final action is taken by the State. If this is not successful, EPA will submit written comments to the State in accordance with 40 C.F.R. § 271.19 and send a copy of those comments to the permit applicant. The State agrees not to proceed with a final action until it receives EPA's written comments and attempts to resolve EPA's comments as described below:

1. The State and EPA will attempt to reach agreement on permit conditions in dispute before the State issues a draft permit or approves proposed permit modifications to an existing permit.
2. Whenever there is a disagreement between their staffs on the terms of any RCRA permit to be issued by the State, the Secretary and the Regional Administrator or their designees agree to confer in a timely manner to resolve the disagreement. Unless otherwise agreed, the Secretary and the Regional administrator or their designees will work toward resolving all issues within thirty (30) days of their first involvement in the issues.
3. EPA will withdraw its comments in writing if satisfied that the State has met or refuted its concerns in writing and will provide the permit applicant with a copy of the withdrawal.
4. It is the desire of both Parties that the Associate Director of the Office of Remediation at EPA, the Program Manager of the Hazardous Waste Permitting Unit, and the Assistant Director of the Corrective Action Program at DEP will attempt to resolve disagreements about the terms of RCRA permits. Any remaining disagreements will be brought thereafter to the attention of the Land and Chemicals Division Director at EPA and the Directors of the Divisions of Water & Waste Management and Land Restoration at DEP for resolution, and then, if necessary, to the attention of the Secretary and the Regional Administrator. If, after consultation, the Secretary and the Regional Administrator are unable to resolve any issue for which EPA cannot withdraw its comment, the State may proceed to permit issuance. However, in accordance with 40 C.F.R. § 271.19, EPA may take action under § 3008 of RCRA against the holder of a State-issued permit on the ground that the permittee is not complying with a condition that the Regional Administrator, in commenting on that permit application, draft permit, or proposed permit modification, stated was necessary to implement approved State Program requirements, whether or not that condition was included in the final permit.

Under the authority of § 3008(a)(3) of RCRA, and in accordance with the procedures of 40 C.F.R. part 124, EPA may terminate a State-issued permit or bring an enforcement action in the case of a violation of a State Program requirement. In exercising these authorities, EPA will observe the conditions established in 40 C.F.R. § 271.19(e) and any other applicable authorities.

D. Coordinated Permitting Process

The State and EPA agree to coordinate the issuance of permits, including joint permits, in the State for facilities subject to those provisions of HSWA for which the State does not have authorization. In accordance with § 3006(c)(3) of RCRA, the State may enter into an agreement with the Regional Administrator under which the State may assist in the administration of the requirements and prohibitions that take effect pursuant to HSWA. Details of coordinated

permitting activities will be set forth in the Grant Work Plan and will be reviewed and revised as often as necessary, but no less often than annually, to assure their continued appropriateness. Upon authorization of the State for a permit-related provision of HSWA, the details of any coordinated permitting activities set out in the Grant Work Plan will be amended to reflect the authorization.

VI. PERMIT ADMINISTRATION

A. EPA

EPA will administer, pursuant to 40 C.F.R. parts 124 and 270, the RCRA permits or portions of permits it has issued for facilities in the State until they expire or are terminated. EPA will be responsible for enforcing the terms and conditions of the federal portions of the permits while they remain in force. Prior to authorization of additional authorities, EPA and the State may establish interim agreements that will allow State work sharing activities. When the State either incorporates the terms and conditions of the federal permits in State RCRA permits or issues State RCRA permits to those facilities, EPA will terminate those permits pursuant to 40 C.F.R. parts 124 and 270.

B. State

The State agrees to review all hazardous waste permits that were issued under State law before the appropriate effective date of authorization in accordance with 40 C.F.R. § 271.13(d) and to modify or revoke and reissue those permits as necessary to require compliance with the authorized State Program. The State will notify EPA of any permits not equivalent to federal permit requirements, including any permits that have been issued but are pending administrative or judicial appeal. Except for these non-equivalent permits, once EPA has determined that the State has fulfilled the requirements of 40 C.F.R. § 271.13(d), EPA will terminate the applicable federal permit or federal portion of the permit, pursuant to the procedures in 40 C.F.R. § 124.5(d), notify the State that the permit is terminated, and no longer administer those permits or portions of permits for which the State is authorized. The State also agrees to resolve all State permit appeals in a manner consistent with its authorized RCRA Program.

VII. CORRECTIVE ACTION

On December 15, 2003, EPA approved the State's application for revision of the State authorized Hazardous Waste Program. The 2003 approval included, among other things, the authority for the State to implement corrective action at hazardous waste sites. EPA's authorization of the State's Corrective Action Program and the provisions of this MOA relate to corrective action permitting responsibilities under RCRA §§ 3004(u) and (v). This MOA does not alter the corrective action authorities granted to the State in 2003. This MOA sets forth more specific procedures regarding how the State will implement corrective action at hazardous waste sites and clarifies the role of the State's Voluntary Remediation Program (hereinafter "VRP") within the Corrective Action Program.

EPA understands that the State intends to utilize the cleanup standards in its VRP at RCRA corrective action sites. EPA has reviewed the VRP, and in a letter to DEP dated August 21, 2008, EPA identified areas where the VRP standards are potentially inconsistent with EPA corrective action requirements and guidance documents. However, EPA agrees to allow the use of the VRP standards to the extent that the requirements of the VRP are consistent with and no less stringent than the federal corrective action requirements and that completed cleanups are consistent with EPA goals. For those sites where EPA has determined that the application of VRP standards will not result in cleanups that are protective of the environment, the State will use the appropriate EPA requirement to assure that the cleanup will protect the environment.

A. EPA

EPA oversight of State remedy selection decisions will be performed in accordance with work-sharing responsibilities established in the Grant Work Plan. EPA will assist the State with all aspects of the RCRA cleanup program and support its efforts to conduct faster, focused, and more flexible RCRA cleanups. EPA may require that the State submit to EPA draft corrective action documents pertaining to a particular site where the State proposes to use VRP standards. EPA will review these documents to determine whether application of the VRP standards is protective of human health and the environment and consistent with the State's EPA-authorized Corrective Action Program.

B. State

The State, upon request by EPA, shall submit to EPA for review draft remedy selection decision documents for specific sites where the State proposes to use VRP standards. In cases where EPA determines that the VRP standards are less protective than the authorized Corrective Action Program, the State shall not use the VRP standards in that particular case.

The State agrees to ensure that any cleanup subject to RCRA corrective action that is completed using the VRP standards will be as protective of human health and the environment as a cleanup completed pursuant to its authorized RCRA Corrective Action Program. The State will conduct its authorized Corrective Action Program in a manner consistent with applicable EPA guidance and law and in a manner that promotes rapid achievement of cleanups to protect human health and the environment. Specifically, the State will, to the extent practicable, do the following:

1. Adopt flexible, practical, results-based approaches that focus on short-term control of human exposure and migration of contaminated groundwater, the long-term goal being final cleanup.
2. Foster innovation, creativity, communication, and technical expertise, focusing on accelerating cleanups and meeting program goals.
3. Provide ready public access to information and meaningful opportunities for public involvement in the cleanup process. Specifically, the State will implement public notice and participation procedures for corrective action permits, corrective

action orders, voluntary corrective actions, and proposed remedy decisions, even in situations where cleanups are completed and documented to meet the State's standards under its VRP. These public participation activities will include:

- a. Writing a statement of basis discussing the proposed remedy;
 - b. Providing public notice;
 - c. Providing a public comment period (30 – 45 days);
 - d. Holding a public hearing, if requested;
 - e. Writing a final decision and response to comments; and
 - f. Using information repositories.
4. Ensure that each statement of basis describing the proposed remedy explicitly articulates all measures taken to address those provisions in the VRP that have been identified by EPA potentially to be inconsistent with the State's EPA-authorized Corrective Action Program.
 5. Not enter into Voluntary Remediation Agreements (VRAs) under the VRP with owners or operators of facilities currently subject to federal and/or State corrective action enforcement, including, but not limited to, an administrative order, a judicial order, an injunction, or a consent decree.
 6. Provide for formal DEP review and approval of all required reports for corrective actions performed pursuant to permits and orders and those performed voluntarily, including all remedial investigation/site characterization reports, risk assessment reports, cleanup/remedial work plans, final reports, post-remediation care plans, and, to the extent DEP approves any such plan or report, to put such approval in writing. DEP agrees that the automatic approval provisions of the VRP as provided in 60 C.S.R. 3 § 10.3.c. will not be utilized at facilities subject to its EPA-authorized Corrective Action Program.
 7. Submit to EPA copies of all final corrective action decision documents prior to issuance.
 8. Carefully consider key program guidance (and all updates) in conducting the RCRA Corrective Action Program.
 9. For facilities following the VRP standards:
 - a. Require owners and operators of such facilities to describe the process and evaluation criteria for the recommended remedy or remedies in writing.
 - b. Notify EPA of facilities for which DEP plans to approve the use of the VRP.
 - c. Submit to EPA for review copies of required corrective action reports (i.e. remedial investigation/site characterization reports, risk assessment

reports, cleanup/remedial work plans, final reports, and post-remediation care plans) within seven (7) days of EPA request.

- d. Submit to EPA for review a copy of all draft corrective action decision documents (including, but not limited to, written approvals of reports and work plans, disapproval comment letters, permit modifications, permits and orders, statement of basis for proposed remedies, and final remedy decisions) prior to issuance to the appropriate recipient (i.e. the facility, the permittee or the public).
- e. Consider and respond to EPA's comments on draft corrective action decisions prior to issuance of final corrective action decision documents.

C. Corrective Action Strategy

Pursuant to its EPA-authorized Corrective Action Program, the State has been responsible for the issuance and enforcement of any new corrective action permits since December 15, 2003. EPA will continue to administer and enforce corrective action permits it has issued until they expire, or if they are terminated by EPA because the State has modified or issued a permit that is not less stringent than EPA's corrective action permit. Administration of the corrective action facility universe will be divided between EPA and the State in a manner consistent with the mutually agreed upon corrective action procedures set forth in this MOA and the Grant Work Plan. The Grant Work Plan will revise the division of the facility universe as necessary and detail the work to be performed on permit issuance and corrective action work-sharing activities. The State agrees to work cooperatively with EPA to meet the State's share of the 2020 goals for the Corrective Action Program, the details of which will be established in the Grant Work Plan. EPA's long-term goal for corrective action is to complete construction of final remedies at ninety-five percent (95%) of all low, medium, and high priority facilities.

Both Parties agree to continue to communicate about and coordinate respective corrective action activities at RCRA facilities. Where either Party can offer management, programmatic, or technical assistance to assist the other in meeting site-specific objectives or mutual program goals, such support will be provided to the extent resources and competing priorities allow. To the degree possible, specific plans and expectations to coordinate respective corrective action activities will be negotiated in RCRA Grant Work Plans. Site-specific corrective action work-sharing activities will be defined in the State's Grant Work Plan.

VIII. WAIVERS AND DELISTING

The State agrees to notify EPA of all delisting petitions received and to transmit to EPA a copy of all final actions. The State agrees to inform delisting petitioners of their need to petition EPA for a delisting action for interstate activities. The State agrees to inform EPA at the beginning of any public notice or public comment period for a proposed delisting action.

Upon receipt of a request to delist a hazardous waste, the State and EPA agree to the following delisting process:

1. The State will provide EPA with a copy of the request.
2. The State will evaluate the request and determine whether the waste should be delisted. The State understands that if delisting actions result in the State Program no longer being equivalent to EPA's, EPA may begin proceedings to withdraw authorization of the State's program.
3. The State will notify the petitioner and EPA of the delisting decision.
4. EPA will only publish its decision of the delisting request in the Federal Register if the petitioner requests an EPA determination. While the effect of federal delisting is to exclude a waste from federal regulatory control, the State's regulatory control is not affected by federal delisting.
5. If EPA receives a request to delist a hazardous waste, EPA will forward the request to the State. The request will then be handled as described above.
6. If EPA receives a request to delist a hazardous waste and the petitioner indicates that it is knowledgeable of the State's role in the delisting process, but specifically requests an EPA decision, EPA will:
 - a. Provide the State a copy of the request; and
 - b. Invite the State to enter into a work sharing agreement with EPA to evaluate the request and determine whether the waste should be delisted; and either
 - i. Publish the results of the decision in the Federal Register and note that the State's decision is the same as EPA's, if the State and EPA agree on the decision; or
 - ii. Seek to resolve the issue with the State, if the State disagrees with the EPA decision. If no agreement can be reached, EPA will publish EPA's decision in the Federal Register and note that the State disagrees with the EPA decision.

The State agrees to provide EPA with a copy of each State decision regarding waivers and delisting petitions at the time those requests are granted.

IX. COMPLIANCE MONITORING AND ENFORCEMENT

Both EPA and the State are committed to maintaining a level playing field and establishing a credible deterrence to noncompliance throughout the regulated community. As a result, EPA and the State will work together to develop and implement a plan to coordinate compliance monitoring and enforcement activities. These activities may include, but are not

limited to, identifying federal and State priorities, developing and implementing inspection targeting methods, developing targeted inspection lists, exchanging information regarding ongoing federal and State enforcement actions against significant noncompliers (SNC) and secondary violators as defined in EPA's Hazardous Waste Civil Enforcement Response Policy dated December 2003 or any revisions thereto (hereinafter "EPA's Hazardous Waste CERP").

Enforcement and compliance monitoring activities/priorities will be outlined in the Office of Enforcement and Compliance Assurance's MOA guidance. EPA and the State will negotiate Enforcement and Compliance monitoring activities/priorities and describe them in the State's Grant Work Plan.

A. EPA

1. Compliance Monitoring

Nothing in this MOA restricts EPA's right to inspect any establishment or facility or other place where hazardous wastes are or have been generated, stored, treated, transported from, or disposed of or to bring an enforcement action against any person believed to be in violation of the State or federal Hazardous Waste Program or to exercise its authority under §§ 3008, 3013, and/or 7003 of RCRA. Before conducting any such inspection of a regulated facility, standard procedure will be for EPA to give the State at least seven (7) days' notice, in accordance with 40 C.F.R. § 271.8(b)(3)(i). Based on emergency circumstances, EPA may shorten this period. The State may participate in all inspections EPA conducts. EPA will coordinate oversight and training inspections with the State.

In an effort to improve enforcement coordination and clarify roles and responsibilities between EPA and the State, the lead agency of an inspection will routinely be the lead in any enforcement action to address RCRA violations discovered during the inspection. However, the Parties recognize that it may be more appropriate in some cases to defer enforcement action to the other agency. Discussion and mutual agreement will be sought in those cases.

2. Enforcement

EPA may take enforcement action against any person determined to be in violation of RCRA in accordance with § 3008 of RCRA. EPA may also take enforcement action upon determining that the State has not taken timely or appropriate enforcement action in a manner consistent with EPA's Hazardous Waste CERP. EPA reserves its right to take independent enforcement actions in the State. When the State refers an enforcement case to EPA, EPA will review the information provided and determine the appropriate federal action, if any. Before issuing a complaint, compliance order, or referral to the Department of Justice, EPA will give notice to the State. If EPA determines it will not take an enforcement action, the State retains the right to take its own enforcement action.

After notice to the State, EPA may take action pursuant to RCRA § 3008, including action against the holder of a State-issued permit, on the ground that the permittee is not complying with a condition of that permit. In addition, EPA may take action under § 3008 of

RCRA against a holder of a State-issued permit on the ground that the permittee is not complying with a condition that the Regional Administrator, in commenting on that permit application or draft permit, stated was necessary to implement approved State Program requirements, whether or not that condition was included in the final permit. EPA may take action under RCRA § 3008 in a manner consistent with EPA's Hazardous Waste CERP or with the EPA Region III Non-Compliance Response Policy for RCRA, Oil and EPCRA/CERCLA Section 103.

Under the authority of § 3008(a)(3) of RCRA and in accordance with the procedures of 40 C.F.R. part 124, EPA may terminate a State-issued permit or bring an enforcement action in the case of a violation of a State Program requirement. In exercising these authorities, EPA will observe the conditions established in 40 C.F.R. § 271.19(e) and any other applicable authorities.

EPA may exercise its authorities set forth in RCRA §§ 3008, 3013, and 7003 and coordinate the issuance, negotiation, and oversight of orders issued under these authorities with the State. EPA and the State will negotiate the lead agency for oversight. Facilities will be prioritized and oversight activities will be established in the Grant Work Plan.

B. State

1. Compliance Monitoring

The State agrees to carry out a timely and effective program for monitoring compliance of regulated hazardous waste facilities with applicable Program requirements (*see*, 40 C.F.R. § 271.15). As part of this Program, the State will conduct compliance inspections to assess compliance with hazardous waste regulations or administrative rules, permit requirements, compliance schedules, and all other program requirements. State-specific activities and priorities for compliance monitoring will also be included in the Grant Work Plan.

2. Enforcement

The State agrees to take timely and appropriate enforcement action and agrees to make SNC determinations in a manner consistent with EPA's Hazardous Waste CERP against all persons in violation of hazardous waste regulations or administrative rules, permit requirements, compliance schedules, and all other program requirements.

The State will maintain procedures for receiving and ensuring proper consideration of information about violations submitted by the public. The State agrees to retain all records for at least three years, unless there is an enforcement action pending. In that case, all records will be retained until three years after the action is resolved.

X. AVAILABILITY OF INFORMATION

A. General

Section 3006(f) of RCRA provides that the State may be authorized by the Regional Administrator under this section if the State Program provides for the public availability of information obtained by the State regarding facilities and sites for the treatment, storage, and disposal of hazardous waste and if such information is available to the public in substantially the same manner and to the same degree as would be the case if the Regional Administrator were carrying out the provisions of RCRA Subtitle C in the State.

B. Requests for Information

Consistent with the Federal Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. § 552(a)(2), the State agrees to make certain materials routinely available without a formal FOIA request, namely final opinions or orders in case adjudications, State administrative rules, statements of EPA policy, and administrative staff manuals affecting the public. In addition, records prepared for routine public distribution (i.e. press releases, copies of speeches, pamphlets, and educational materials) will be available.

The State agrees to perform the custodial duties outlined in the West Virginia Freedom of Information Act (hereinafter "WVFOIA"), W. Va. Code § 29B-1-1, et seq., concerning public records. As part of those duties, the State agrees to make reasonable efforts to assist a requestor in identifying records being sought and to help the requestor formulate his or her request. *See*, W. Va. Code § 29B-1-3.

If a request for information is denied, the State will, in accordance with W. Va. Code § 29B-1-3(4)(c), provide the requestor the basis for the denial and notify the requestor of WVFOIA enforcement procedures, which specifically allow any person denied the right to inspect the public record of a public body to institute proceedings for injunctive or declaratory relief in the circuit in the county where the public record is kept. *See*, W. Va. Code § 29B-1-5(1).

The State agrees that, in addition to the waiver of fees outlined in DEP's *Rules on Freedom of Information Act Requests* (60 C.S.R. 2 § 11), DEP will allow for the reduction or waiver of fees as provided in 40 C.F.R. § 2.107(l). A reduction or waiver of fees will be considered in connection with each request from a representative of the press or other communication medium or from a public interest group. The State agrees to reduce or waive the fee if it determines that a reduction or waiver of the fee is in the public interest, because furnishing the information can be considered as primarily benefitting the general public.

Pursuant to WVFOIA (W. Va. Code § 29B-1-1, et seq.), West Virginia's Hazardous Waste Management Act (W. Va. Code § 22-18-12, "Confidential Information"), DEP's *Rules on Freedom of Information Act Requests* (60 C.S.R. 2), and DEP's administrative rule entitled *Hazardous Waste Management System* (33 C.S.R. 20 § 11.18, "Public Access to Information"),

the State agrees to make the fullest possible disclosure of records to the public, subject to any exemptions under the federal FOIA recognized by the State.

C. Confidentiality of Business Information or Trade Secrets

If a claim of confidentiality is asserted and cannot be resolved in the time period provided for an agency response to a request, the State agrees to notify the requestor of the confidentiality claim within the maximum five-day time limit provided for an agency response. In addition, the State will tell the requestor that his or her request was denied in order to resolve the confidentiality claim.

D. Oversight

The State agrees to keep a log of denials of requests for information or a file containing copies of denial letters sent to requestors, which will be made available to EPA during State reviews. The State also agrees to keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures or priorities, as applied to RCRA § 3006(f).

XI. STATE SPECIFIC AGREEMENTS

A. Groundwater Protection Standards

With respect to the State's provision at 33 C.S.R. 20 § 7.4.c.1., which requires the Secretary to specify in the facility permit the frequencies for collecting samples required under 40 C.F.R. § 264.99(g), the State agrees to require sample collection at least annually. Under no situation will the frequency be less than what would be required by EPA.

Pursuant to the State's administrative rule entitled *Requirements Governing Groundwater Standards*, in any instance where the 46 C.S.R. 12 standard is less stringent than the Federal requirements, the State agrees to act in accordance with the Federal regulations and use the 40 C.F.R. Parts 264 and 265 Subpart F standards for purposes of determining the need for corrective action at hazardous waste treatment, storage or disposal facilities.

B. Other State Agencies

The State's RCRA Hazardous Waste Management Program includes three (3) separate and distinct state agencies: the DEP (which includes the Divisions of Air Quality, Land Restoration, and Water & Waste Management and the Environmental Quality Board), the DOH, and the PSC. Each agency has rulemaking, permitting, compliance evaluation, enforcement, or appellate responsibility, or a combination thereof. For administrative purposes, DEP will serve as the lead agency to simplify coordination and communication between the State and EPA. The State will coordinate its program activities through DEP's Division of Water & Waste Management (hereinafter "DWWM"), which is designated as the lead DEP program office.

DEP, through DWWM, will ensure that the State's responsible agencies fulfill the State's statutory duties for ensuring that the administration and enforcement of the State's Hazardous

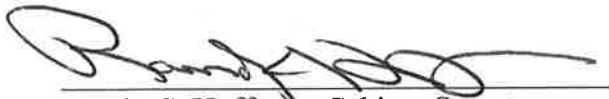
Waste Management Act is integrated with the appropriate provisions of other State laws and for overseeing the timely promulgation of administrative rules. In addition, DEP will facilitate communications between EPA and the State agencies having RCRA program responsibilities and will monitor the coordination process between State agencies. DEP will also perform coordination functions including: serving as a clearinghouse for information concerning EPA's RCRA program requirements, coordinating State program milestones, coordinating actions necessary to secure federal funds for the Program, and overseeing distribution of those funds to agencies in the State Hazardous Waste Management Program, where warranted.

The responsibilities of each agency are delineated in the State's Program Description and the attached MOU. In general, DEP's DWWM functions as the lead agency with primary responsibility for promulgating administrative rules and consulting with the other State agencies to ensure that their administrative rules regarding hazardous waste are comprehensive and not duplicative.

XII. EFFECTIVE DATE

This MOA will become effective at the time the State's authorization takes effect, which will be the date set out in the Federal Register notice of the Regional Administrator's decision to grant authorization to the State.

STATE OF WEST VIRGINIA BY:



Randy C. Huffman, Cabinet Secretary
Department of Environmental Protection

Date: April 17, 2013

**U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION III, BY:**



Name

U.S. EPA Regional Administrator
Title

November 1, 2013
Date